

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

JERRY DAVIDSON, individually	.	Civil Action No. 1:20cv1263
and on behalf of all others	.	
similarly situated,	.	
	.	
Plaintiff,	.	
	.	
vs.	.	Alexandria, Virginia
	.	January 8, 2021
UNITED AUTO CREDIT	.	10:00 a.m.
CORPORATION, a California	.	
corporation,	.	
	.	
Defendant.	.	
	.	
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TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE LEONIE M. BRINKEMA
UNITED STATES DISTRICT JUDGE
(Via Teleconference)

APPEARANCES:

FOR THE PLAINTIFF:	KRISTI C. KELLY, ESQ. Kelly Guzzo, PLC 3925 Chain Bridge Road, Suite 202 Fairfax, VA 22030 and LEONARD A. BENNETT, ESQ. Consumer Litigation Associates, P.C. 763 J. Clyde Morris Boulevard Suite 1-A Newport News, VA 23601 and JANET R. VARNELL, ESQ. Varnell and Warwick, P.A. 1101 E. Cumberland Avenue Suite 201H, #105 Tampa, FL 33602
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(APPEARANCES CONT'D. ON FOLLOWING PAGE)

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COMPUTERIZED TRANSCRIPTION OF STENOGRAPHIC NOTES

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1 P R O C E E D I N G S

2 THE COURT: Good morning, counsel. This is the
3 matter of Jerry Davidson, individually and on behalf of all
4 others similarly situated, versus United Auto Credit
5 Corporation, a California corporation, Civil Action 20cv1263.

6 Do we have counsel here for the plaintiff?

7 MS. VARNELL: Yes, Your Honor. This is Janet
8 Varnell, and on the line with me are a number of my cocounsel.

9 THE COURT: All right, Ms. -- I'm sorry, Ms. Varnell,
10 are you going to be the main spokesperson for the plaintiff?

11 MS. VARNELL: I would like to.

12 THE COURT: All right, that's fine. Did you want to
13 introduce the other participants?

14 MS. VARNELL: I guess I'd like them to each introduce
15 themselves, please.

16 THE COURT: All right, go ahead.

17 MS. KELLY: Good morning, Judge. This is Kristi
18 Kelly with Kelly Guzzo on behalf of the plaintiff as well.

19 THE COURT: Good morning.

20 MR. BENNETT: And, Judge, this is Leonard Bennett,
21 also on behalf of the plaintiff, calling from down here in
22 Newport News.

23 THE COURT: All right, Mr. Bennett.

24 MR. BENNETT: Good morning.

25 THE COURT: Good morning.

1 Anybody else for the plaintiff?

2 (No response.)

3 MS. VARNELL: Your Honor, I believe Ms. --

4 THE COURT: Go ahead, Ms. -- now, we're on the
5 record, but we can't see you because this is by the phone, so
6 counsel need to state their name before they speak.

7 Ms. Varnell, was there anyone else for the plaintiff that you
8 wanted to put on the record?

9 MS. VARNELL: There is, Your Honor. I believe Tina
10 Wolfson and Chris Stiner are also on the call for the
11 plaintiff.

12 THE COURT: All right. Anybody else?

13 (No response.)

14 THE COURT: Well, that's certainly enough.
15 Ms. Varnell, I'm going to expect to hear just from you then for
16 the plaintiff.

17 And for the defendant?

18 MR. KIM: Good morning, Your Honor. Raymond Kim for
19 defendant, United Auto Corporation.

20 THE COURT: All right. And anybody else with you,
21 Mr. Kim?

22 MR. KIM: Yes, Your Honor.

23 MR. SABALEWSKI: Good morning -- good morning, Your
24 Honor. This is Travis Sabalewski, also for the defendant.

25 THE COURT: All right, very good. But, Mr. Kim, I'm

1 assuming you're the main spokesperson for the defendant; is
2 that correct?

3 MR. KIM: That's correct, Your Honor.

4 THE COURT: All right. What we have here is the
5 defendant's motion to dismiss the plaintiff's second amended
6 complaint, and this is brought under Federal Rule of Civil
7 Procedure 12(b)(6). I mean, there is one, as I understand it,
8 overriding claim in this case, which is that the defendant is
9 arguing that this particular consumer transaction for the sale
10 of an automobile to an active member of the U.S. military is
11 not covered by the special statute that governs loans to
12 military people, the MLA.

13 I would like, Ms. Varnell, for you to confirm with me
14 my view that if, in fact, the transaction here was not a -- is
15 exempt from the requirements of the MLA, then I believe that
16 that ends the litigation. Would you agree with that? In other
17 words, all of the claims that you raise are raised specifically
18 as alleged violations of that statute.

19 MS. VARNELL: That's entirely true, Your Honor. Your
20 decision today hinges entirely on whether or not the exemption
21 should be afforded to this defendant where they sold an
22 additional add-on product, a financing product, in addition to
23 the vehicle itself.

24 THE COURT: All right. Now, the question that I have
25 for the plaintiff at this point is how can you -- do you have

1 any case law, because we couldn't find any, any case law where
2 the courts have interpreted this type of an argument before,
3 that is, where there is this GAP provision of what I would deem
4 to be basically sort of an insurance policy kind of provision
5 rendering this as a hybrid transaction that would put it
6 outside of the exemption?

7 In other words, is there any case law to your
8 knowledge that has addressed the issue that's before this
9 Court?

10 MS. VARNELL: I am absolutely certain that there is
11 not, Your Honor. We are making the law in this case.

12 THE COURT: Okay. That was our impression.

13 MS. VARNELL: I --

14 THE COURT: Go ahead.

15 MS. VARNELL: I do wish to inform the Court, though,
16 about a little bit of history because there was a nearly
17 identical case filed against the other largest financier of
18 buy-here/pay-here, the used car dealerships in the country
19 under the MLA. I filed that case in the Middle District of
20 Florida, and I wish that I could offer you an opinion from that
21 case, but because that case is a little bit more complex and
22 because of the particular actions of the defendant in that case
23 and the National Auto Dealers Association, we should not expect
24 the decision in that case prior to this Court's.

25 I do think it's relevant to your consideration, what

1 happened in that case, because that's exactly why we have these
2 waters muddied perhaps from the withdrawal of the guidance that
3 was very clear, I would waive summary judgment in both the
4 Florida case and this case tomorrow in the event that that
5 guidance was still on the books, but the waters were muddied
6 particularly because I sued the largest buy-here, pay-here
7 dealership and finance company in the country for this
8 same-type violation, and within months of filing this, they ran
9 to this administration, the National Auto Dealers Association
10 did, and requested that they withdraw this clear poster child
11 guidance that said if you finance GAPs in addition to this,
12 that's the exact example of a transaction that would not be
13 covered by the extension.

14 And that's really what created the -- sort of muddied
15 the waters for the Court, that it should not muddy the waters
16 for the Court because the prior existing guidance from the
17 Department of Defense and the clear language of the statute and
18 the regulation which has not changed says that this is consumer
19 credit. The financing of this insurance-related product is
20 consumer credit.

21 And, Your Honor, I would request that the Court, I do
22 believe that it's crystal clear that this is a very simple
23 decision and that's the only serious decision that Your Honor
24 needs to make in determining the motion. I would ask that the
25 Court let me explain a little bit about why this case is so

1 important beyond the fact that it's the first case that will
2 interpret this issue.

3 THE COURT: Go ahead.

4 MS. VARNELL: The case is important because only, you
5 know, the law is -- this law is meant to protect those who
6 protect us. As a veteran myself and a career consumer
7 protection attorney, I could tell you that I understand very
8 well what happens to our military when they get into financial
9 distress, and I want this Court to understand that most --
10 something that most people are not aware of.

11 When a servicemember gets into financial distress,
12 they lose their security clearance. It happens to over 20,000
13 soldiers each year in this country, and about 80 percent of
14 those are directly due to really bad loans like the one here.
15 It's bad for the soldiers, and it costs our military millions
16 and millions of dollars every year.

17 In this case, Sergeant Jerry Davidson, he's an
18 aviation operations supervisor at the time that he took this
19 loan for the United States Army, and his wife, who is still
20 today an army flight instructor, they were both sold a crappy
21 2011 used car by this defendant, by a defendant dealership that
22 this company -- that this defendant finances.

23 The used car lots are always intentionally co-located
24 with our military bases all over the United States, and these
25 used car lots typically do what we saw here. They add on other

1 products and other amounts in order to create a profit center,
2 and when they do such, they have to comply with the MLA, just
3 like every other finance company, every other credit union has
4 managed to do since passage of the Military Lending Act, and in
5 this case, this crappy used car, the actual calculation of the
6 interest rate was over 26 percent for a 2011 GMC Acadia.

7 So this case is important because this is precisely
8 why the Military Lending Act was passed. So I'll leave it at
9 that and answer any other questions that Your Honor might have
10 on her mind.

11 THE COURT: All right. Well, I want to ask both of
12 you to talk to me a little bit about this GAP, I'm calling it
13 insurance. Do I understand correctly that it works in the
14 following fashion: I call it insurance because it looks to me
15 as though that's what it is, that it -- for a fee, it provides
16 that if the vehicle is totaled, because that's the security for
17 the loan, at that point, I am assuming that the loan or what is
18 due on the loan is forgiven.

19 Is that correct, or do I misunderstand how that
20 works?

21 MR. KIM: Your Honor -- Your Honor, this is Ray Kim
22 for the defendant. That essentially -- that is essentially
23 accurate. So just to give you an example, if a borrower
24 finances the vehicle and, let's say, finances \$20,000 and then
25 the next day or a year later totals the vehicle or, for

1 instance, such as a vehicle was stolen and it is deemed a total
2 loss but the insurance company will only cover, let's say,
3 \$10,000 but the borrower still owes \$15,000, the insurance will
4 cover the additional 5,000, so the borrower will owe nothing to
5 the auto finance company. So it's a form of insurance.

6 So it covers that gap between what is owed to the
7 auto finance company and what the, what the insurance will
8 cover for the loss.

9 THE COURT: All right. Now, Ms. Varnell, do you
10 agree that that's how the GAP operates?

11 MS. VARNELL: I believe that that is the basic
12 premise of GAP, but I think it's very important that this Court
13 understand that a dealership does not have to sell GAP in order
14 for a buyer to have GAP protection. You can go -- any, any
15 person who has insurance on their car, which everyone is
16 required to maintain, as were the plaintiffs in this case, and
17 buys for 50 or 60 dollars a tiny percentage of your collision
18 amount, you can buy GAP coverage for 50 or 60 bucks on your
19 insurance policy, but instead, these dealerships use this
20 add-on product at, in this case, it was \$395, almost \$400
21 instead of 50 bucks, and they, you know, they don't have to buy
22 it from the dealerships, but what these dealerships typically
23 do is force it in where they say you need this, it needs to go
24 on here, you need to have this because we sold you a car,
25 obviously, that's going to be in serious negative equity the

1 minute that you drive it off the lot, in fact, it's not going
2 to be worth what they paid for it, obviously, on the day that
3 they bought it.

4 So I think it's important that this Court understand
5 that there's many other ways to have GAP protection other than
6 to be sold it at an exorbitant rate and have it essentially put
7 on the contract automatically as not -- it's not even optional.

8 THE COURT: Whoa, whoa, whoa. Why do you say it's
9 not optional? I thought there was an opportunity to check for
10 it or against it.

11 MS. VARNELL: Well, you would think that's the case,
12 but what we know and what discovery will immediately reveal is
13 that it's present on every one of the deals that these used car
14 dealers make because this is a profit center for them, and so
15 most consumers are not in the position to understand that this
16 is something that they could get as part of their -- when they
17 go to purchase insurance on their vehicle elsewhere.

18 So it's, it's just -- you know, in this case, I think
19 what you'll see is that GAP is going to be present on virtually
20 every transaction that this, that this defendant finances.
21 It's very important for profit.

22 THE COURT: All right. Mr. Kim?

23 MR. KIM: Your Honor, this is --

24 THE COURT: Go ahead.

25 MR. KIM: I'm sorry, Your Honor, this is Ray. Just

1 to address a couple of points there, I can't speak to how much
2 GAP insurance costs after market in Virginia. I would be
3 shocked if it's 50 or 60 dollars, but, but I don't think it is
4 50 or 60 dollars. That's the first point.

5 And second, GAP insurance, it is completely optional.
6 Ms. Varnell is -- I believe it's, you know, it's speculation
7 that these are included in, in every retail installment sale
8 contract from these dealerships. At the end of the day, you
9 know, the borrowers are walking into the dealerships, and they
10 are working with the dealerships to purchase the vehicle and
11 purchase GAP insurance, and in my experience, it's always been
12 optional, as well as I would be shocked, I think it's something
13 that would -- that Ms. Varnell would have to take up with the
14 dealerships in this instance if that's not the case, but I
15 would be shocked that that is something that's mandated by the
16 dealerships.

17 THE COURT: Well, it's on the contract, but as I
18 looked at the contract, there's no indication that there has to
19 be -- it has to be accepted by the consumer. There were some
20 things on that contract which the consumer had not accepted, as
21 I recall. There were other optional costs that the consumer
22 did not -- there's no little check mark indicating that that
23 had been accepted.

24 All right. Well, that's one question.

25 MR. KIM: That's correct, Your Honor.

1 THE COURT: Yeah.

2 MR. KIM: It's a blank line item. It's not even
3 listed on the contract, and it has to actually be inserted into
4 the contract.

5 MS. VARNELL: It is largely irrelevant to the crystal
6 clear decision that this Court has to make today anyway. The
7 fact of the matter is the plaintiff was charged for GAP, paid
8 for GAP. It was part of the finance contract. It was an
9 additional product over and above the vehicle itself, and it
10 was a financing product.

11 THE COURT: Yeah, but the question is not quite that
12 simple, it seems to me, given the fact that the instruction
13 was, was there at one point which would, as you correctly said,
14 probably have made this a very simple decision, and then it
15 was, it was withdrawn.

16 Now, whether it was withdrawn for good reasons or bad
17 reasons is really, you know, at this point not before the
18 Court. The question is whether or not one can characterize
19 this GAP insurance as, as being within the scope of the overall
20 motive for this statute, which is a very good statute. It's
21 meant to protect a special class of consumers.

22 But would you not agree, Ms. Varnell, that having an
23 insurance that protects the consumer from being on the hook for
24 having to pay on a loan for a car that has -- for which the
25 security has disappeared is actually a protection to some

1 degree? If the servicemember does not have GAP insurance and
2 if the car were totaled or stolen, then -- and the, and the
3 insurance that was maintained on the vehicle was insufficient
4 to cover the remainder of the, of the loan, then the
5 servicemember is on the hook.

6 So the one --

7 MS. VARNELL: Well, Your Honor, the basic premise
8 does make sense, but I will assure you, I've been doing
9 consumer protection work for 25 years, and GAP insurance is one
10 of these craft, high, very expensive credit products that
11 consumers should not buy at car dealers.

12 There's, there's an abundant, in fact, there was a
13 fantastic study that came out just this summer, July of 2020,
14 done by the FTC and the CFPB that specifically was looking into
15 all of the extra credit-related products that were put on the
16 consumer transactions, and it is clear when you, when you look
17 at this from the perspective of what the market would properly
18 charge for the protection that's being provided to people,
19 there's much less expensive options and that the car
20 dealerships should not be inserting this GAP insurance at the
21 dealership so regularly.

22 The -- you know, it's a profit center. There's a
23 number of ways that they can sell it. They sell it as GAP
24 waivers when they hold their own -- when they hold the
25 financing contracts themselves, and then they sometimes buy the

1 insurance at, you know, literally from anywhere from 10 to 30
2 percent of what the insurance actually costs for that
3 dealership to buy or that consumer.

4 So I do not agree that these are great products. I
5 think that they're running around wearing a halo wrongly in
6 front of the Department of Defense, saying, oh, we really need
7 to protect soldiers, but that's not the reality of this
8 product. It is -- if you really looked at the overall
9 structure of the loan and what our soldier got in exchange for
10 a very substantial obligation of more than \$21,000, he got sold
11 what we call in the South a pig in a poke.

12 There is -- this is not the kind of transactions that
13 we want to be encouraging, and at a minimum, and you're going
14 to, you know, maybe the government doesn't need to be in the
15 business of regulating whether you get a good deal or a bad
16 deal on a used car, but they darn sure should be in the
17 business of regulating whether or not our soldiers are getting
18 really bad finance charges and these extra add-on products they
19 sell for a substantial percentage of the money that Sergeant
20 Davidson is going to be obligated to pay and is having trouble
21 making the payments on.

22 I'm sure that the defendant could inform the Court
23 that Mr. Davidson was, in fact, behind by a payment at the time
24 that we filed this suit.

25 THE COURT: All right. The other charge that's at

1 issue in this case --

2 MR. KIM: Your Honor?

3 THE COURT: Yeah, go ahead, Mr. Kim.

4 MR. KIM: Your Honor, if I may address a couple
5 points there, with respect to the value of GAP, I really think
6 it's, it's subject to, you know, to differing opinions.
7 Whether it's a profit center or not, I think the value of GAP
8 really depends on the down payment that's being made on the
9 vehicle. So, for instance, in this case, there was a down
10 payment of \$2,500, and the amount financed was about \$15,000.

11 Now, according to Ms. Varnell, you know, this was a
12 crap car. Now, if Mr. Davidson drove this crap car off the lot
13 and got into a car accident and it was totaled and the
14 insurance company was only going to offer him 5,000, he would
15 still owe 10,000 on the vehicle, which the GAP insurance would
16 cover for him.

17 So I think in that instance and that example, it
18 would be very valuable to have GAP insurance, and I think the
19 auto industry recognizes that the value of GAP insurance
20 largely depends on the amount of the down payment that's being
21 made, and here, for instance, the down payment was not
22 significant.

23 And I think we also have to separate -- whether
24 there's a bad deal on a vehicle purchased, I believe that's
25 wholly apart from whether there's a violation of the MLA here,

1 and the MLA, you know, it prohibits APRs or MAPRs greater than
2 36 percent. Here I think it's clear that the MAPR was 22.99
3 percent.

4 We're not here to really discuss, you know, whether
5 it's a good deal or a bad deal, but at the end of the day, Your
6 Honor, again, my client's position is that there was no
7 violation of the MLA.

8 THE COURT: All right. Now, there was also a
9 processing fee that was added onto the total that was financed
10 here. What is the processing fee used for? I don't think that
11 appears in the papers.

12 Mr. Kim, do you know?

13 MR. KIM: I believe it's, it's like a document
14 processing fee, Your Honor, that I believe just generally are
15 applied when there's a vehicle purchased.

16 THE COURT: And when you say "document processing,"
17 this would be the car registration, the application for the
18 license plate, that sort of thing?

19 MR. KIM: Yes, all of that, Your Honor. And then
20 that's paid to the, to the dealership.

21 THE COURT: All right. Now, that's, I believe,
22 though, one of the additional charges about which the plaintiff
23 is claiming violates the -- or am I wrong about that,
24 Ms. Varnell?

25 MS. VARNELL: Actually, Your Honor, I think that we

1 need to do just a tidbit of discovery to determine what this
2 actually means. As Your Honor has correctly noted, it's two
3 words on a piece of paper. Do we know whether or not that is
4 actually directly related to the vehicle itself, was it
5 necessary, or is it just simply an add-on fee?

6 I don't know what the nature of that fee was -- is
7 really about until we do a little bit of discovery, and neither
8 does the Court or the defendant today, so I think that that
9 can't be determined prior to discovery on the nature of the
10 charge.

11 THE COURT: All right.

12 MS. VARNELL: And therefore, the component --

13 THE COURT: All right. Now, the other issue that you
14 both sort of dispute is the actual MPAR (sic) in this case.
15 The defendant submitted an amortization chart and requested
16 that the Court take judicial notice of it, and I did not sit
17 down and I don't intend to sit down with a calculator and try
18 to work this all out, but I will tell you that it appeared to
19 the Court that this made reasonable sense, and I don't think it
20 converts this motion to dismiss to a motion for summary
21 judgment, because what the defendant has simply done is taken
22 the numbers that are in the contract, and the contract clearly
23 is appropriate to be considered because it's inherently the
24 essence of the whole complaint, it lists the amount that was
25 totally -- the total amount that was financed. It lists the --

1 and it lists the monthly payment that results from that amount
2 and from the interest rate that is quoted, and then they simply
3 did the mathematics.

4 So I want to know as an officer of the Court,
5 Ms. Varnell, do you disagree with the numbers that are
6 generated if you take those simple numbers and put them over
7 the 42 months that this contract was for?

8 MS. VARNELL: I do, Your Honor, and please permit me
9 to explain how I arrived at the number that I did.

10 THE COURT: Okay.

11 MS. VARNELL: So when, when I -- because I'm one of
12 the first consumer lawyers who's brought these private actions
13 of this nature, I sought out to determine, okay, how are the
14 credit unions who are financing military servicemembers, what
15 are they using to calculate the MAPR? To what are their banks
16 that are doing this -- who are the people that are doing this
17 right, and what method do they use to determine what the
18 appropriate APR should be listed and what disclosures must be
19 on a contract with an active duty military?

20 And I went to the Credit Union National Association
21 website and read a bunch of their guidance, and what I learned
22 is that the Credit Union National Association hired a
23 particular gentleman to create an MAPR calculator because, you
24 know, the dealerships that are utilizing this and the credit
25 unions all need to know this is exactly something that we can

1 rely upon for properly computing this in compliance with the
2 regulations, and I sought out and hired and put on retainer
3 that particular expert, who created the Credit Union National
4 Association's calculator, and it was very inexpensive, and I
5 learned from him exactly what went into his, the calculations,
6 and then I had him run any transactions from any contracts that
7 I was reviewing through the MAPR calculator, and that was where
8 we came up with the alternative, and the appropriately stated
9 MAPR was from that particular expert on which the overwhelming
10 majority of all credit unions in the United States that are
11 making Military Lending Act loans on cars are using.

12 So --

13 THE COURT: But that doesn't -- I'm sorry, that
14 doesn't explain to me what -- where is the difference between
15 how he is calculating the interest rate, the effective interest
16 rate, and the way the defendant is doing it? Because it seems
17 to me we're dealing with a fairly -- we're a closed-end
18 transaction. This is a case where the interest rate is set,
19 the number of -- the number of months over which the loan
20 applies, that is a set number. It's 42 months, right? There's
21 no dispute about that. It's clear as to when the first payment
22 is due.

23 As I recall how the defendant explained the
24 calculation, they take the interest rate, and they sort of
25 divided what the effective daily rate would be, and so that

1 that first month's payment is a little bit different because of
2 the length of time between the time the contract is signed and
3 the time -- the due date for the first payment.

4 So I don't quite understand where the difference lies
5 between the two approaches.

6 MS. VARNELL: So it's about what category, what block
7 you put the extra charges on, for instance, the, the GAP
8 insurance, which should be included within the financing cost,
9 as opposed to where it's currently being included.

10 And things like, for instance, the MAPR calculator
11 was where we determined that there was prepaid interest,
12 despite the fact that it doesn't appear on the contract, and
13 the expert explains to me that this always happens where you
14 have the time gap between the first payment and the -- and a
15 date here, the transaction took place on the 13th of October,
16 later.

17 So, Your Honor, ultimately you have a factual dispute
18 here, and in the end, you'll see in my complaint that we
19 clearly state that regardless of what the rate that was stated
20 here, it was not presented in the way that a military MAPR has
21 to be communicated to our servicemembers. There are very
22 special requirements of how an MAPR is to be communicated to
23 active duty military, and it is not simply provided in the
24 truth in lending box of this nature. You have to give this
25 separate disclosure, and that's fully stated in the complaint.

1 We believe that the fact that there was not a single
2 disclosure made here just makes it clear that they don't
3 believe the MA -- Military Lending Act really applies. I don't
4 really think that's in dispute. Mr. Kim won't dispute that.

5 This transaction was not made in any way, shape, or
6 form in compliance with the MLA. They're not purporting to say
7 that it does. They didn't give Military Lending Act
8 disclosures.

9 Regardless of what the amounts are, they did not give
10 the disclosures that are required under the MLA. It actually
11 has the words in it, it tells the person where they can call,
12 or it gives them in a written form that explains this is what
13 your MAPR business is, this is what your finance charge
14 actually is, and so they can't wear the clock of compliance
15 because -- merely because they put the TILA disclosures in a
16 truth in lending form.

17 THE COURT: Okay.

18 MS. VARNELL: I mean, if this Court determines that
19 the Military Lending Act does apply because it was an extra
20 add-on finance product, then if you ask Mr. Kim now, I believe
21 that he will tell you as an officer of the Court that this
22 transaction was not done in compliance with the MLA because
23 they did not believe that it applied.

24 THE COURT: All right. Mr. Kim, that's a good
25 question. Do you want to respond to that?

1 MR. KIM: Yes, Your Honor. Well, I think, I think
2 the issues there were somewhat conflated. I think the question
3 of whether the MAPR is accurate, I don't think there really can
4 be a dispute there.

5 The MAPR is slightly different from the APR under
6 TILA because an MAPR is supposed to include, for instance,
7 credit insurance products such as GAP, and here when we look at
8 the contract on page 2, it's undeniable that the total amount
9 financed, the \$14,698.24, includes the \$395 for GAP and
10 includes the \$250 for the processing fee. And so again, you
11 know, it's just, it's just a matter of performing the
12 mathematical calculation.

13 And as Your Honor recognized in our motion on pages
14 13 and 14 and in our amortization table, the math just makes
15 sense that when you take the total amount financed, which again
16 includes GAP insurance and the \$250 processing fee, over 42
17 months based on the, the annual monthly payment, the amount is
18 correct.

19 And again, it's just indisputable that those costs
20 are in the total amount financed, and so, you know, if this
21 expert believes otherwise, you know, I believe that plaintiff
22 would have submitted something in the opposition brief to
23 dispute the math, but again, nothing was provided, and so with
24 respect to the MAPR, again, the 22.99 percent is accurate.

25 Now, I think there's a separate issue that

1 Ms. Varnell raised of whether there were MLA disclosures
2 provided. Under the, under the MLA, it does require that
3 certain disclosures be provided, for instance, that, that the
4 MAPR would not exceed 36 percent. At this point, we have not
5 challenged that issue in the -- in our 12(b)(6) motion, but
6 that's a second, Your Honor, that's a different claim.

7 And so again, our position is that the MLA does not
8 apply here.

9 THE COURT: Well, that's -- as I said at the very
10 beginning, that's the overriding issue, whether the ML -- but
11 that is the question that Ms. Varnell did posit, and I'll
12 repeat it to you, and that is, do you agree that if you are
13 covered by the MLA, that your -- the contract that's before us
14 in this case would not be in full compliance?

15 MR. KIM: I do, Your Honor, yes.

16 THE COURT: Okay. All right. And to some degree,
17 that makes it easy for the Court because it's a crystal clear
18 issue that really wraps the whole case up.

19 Then do you want to add anything further to what
20 either has been argued today or to the briefs as to why your --
21 the contract at issue here is exempt? I mean, do you have
22 any --

23 MR. KIM: Yes, Your Honor.

24 THE COURT: Let me ask you this first: Do you have
25 any case law? Because again, we could not find any that

1 supported the plaintiff's position, but also, we couldn't find
2 any that would support your view.

3 Now, I recognize that the withdrawal of the 2017
4 instruction is somewhat recent, but are you involved, Mr. Kim,
5 in the Florida litigation that was referenced by Ms. Varnell?

6 MR. KIM: I am not, Your Honor.

7 THE COURT: All right. But I assume you're aware of
8 it?

9 MR. KIM: I was not aware of that lawsuit.

10 THE COURT: Oh, all right. Okay.

11 So anyway, are you aware of any litigation or of any
12 case law that addresses this issue?

13 MR. KIM: I'm not, Your Honor. Aside from that one
14 case that we cited in Maryland regarding the arbitration issue,
15 nothing specifically on this particular issue of whether the
16 MLA would apply to an auto finance transaction, and my, my
17 belief is that it's not out there because the statutory
18 language and the regulatory language of the definition of
19 "consumer credit transaction" is just, is just clear, and it's
20 plain language, it would be (inaudible).

21 And so, Your Honor, if I, if I may, because I feel
22 like it's really important to this discussion to make the
23 distinction between the auto finance exception, which is found
24 in the regulation under 32 C.F.R. 232.3(f)(2)(ii), and the
25 personal property exception, which is found under (f)(2)(iii),

1 and I believe that plaintiff is arguing that this auto finance
2 transaction would be subject to the MLA based on the DoD's
3 interpretation of (f)(2)(iii), the personal property exception.

4 I believe that's just incorrect. And if the Court
5 would like, I could -- I can explain our position on that.

6 THE COURT: Go ahead.

7 MR. KIM: Okay. So I think what I should do, perhaps
8 I can start with a little bit of history. Again, as the Court
9 is probably aware, the MLA was originally enacted to protect
10 active military members from certain predatory lending products
11 such as closed-end payday loans and closed-end auto title loans
12 and tax refund anticipation loans, those types of products.

13 In 2015, the DoD expanded the definition of "consumer
14 credit" to include other credit transactions like unsecured
15 open-ended credit lines and credit cards, for instance, and as
16 a result -- at that time, the definition of "consumer credit"
17 always and consistently excluded auto finance transactions
18 where the vehicle was secured -- I'm sorry, where the loan was
19 secured by the vehicle. That has never changed.

20 And not only the statutory definition but in the
21 MLA's regulatory definition, consumer credit transaction always
22 excluded again any credit transaction that's, quote, expressly
23 intended to finance the purchase of a motor vehicle when the
24 credit is secured by the vehicle being purchased, which is
25 exactly the case here with the plaintiff's auto finance

1 transaction.

2 So this, so this auto finance exception, I'll refer
3 to it as the auto finance exception, that's found in again
4 (f)(2)(ii) of the regulations. Again, I think this is
5 important because I believe plaintiff's attempts to kind of
6 conflate the two, the auto finance exception with its other
7 exception found under (f)(2)(iii), which is the personal
8 property exception.

9 And so following the, the DoD's kind of expansion of
10 consumer credit transaction 2015, there were a number of
11 questions that were raised, and so the DoD addressed those
12 questions in a ruling that it issued in August of 2016, and I'm
13 going to refer to this as the August 2016 ruling. And so among
14 other questions, there was question No. 2, which asks whether
15 credit that a creditor extends for the purpose of purchasing
16 personal property which secures credit, whether that falls
17 within the exception of consumer credit under (f)(2)(iii),
18 where the creditor, quote, simultaneously extends credit in an
19 amount greater than the purchase price.

20 Ultimately, the question was if somebody is -- if
21 someone is receiving credit to purchase personal property but
22 in addition they are going to receive a cash advance loan,
23 which is what the DoD referred to it as, then no, that
24 personal -- the personal property exception would not apply to
25 that transaction.

1 So essentially, the DoD said it's, it's a hybrid
2 purchase money and cash advance loan, and it's not expressly
3 intended to finance the purchase of personal property only, and
4 as a result, it's going to be subject to the MLA.

5 So I guess the example I could give is somebody is
6 going to go buy an appliance and they're going to receive
7 financing to go buy a new refrigerator for \$2,500, but in
8 addition, they receive a cash advance loan of \$1,000 completely
9 unrelated to the purchase of that refrigerator. The DoD
10 explained that while that personal property purchase is going
11 to be subject to the MLA under the cash advance loan there,
12 that's, you know, in theory unsecured and has nothing to do
13 with the purchase of the refrigerator.

14 Now, as a result -- and again, that August 2016
15 ruling only dealt with that (f)(2)(iii) and the personal
16 property exception. Then what happened was because of that
17 August 2016 ruling, there were additional questions that were
18 raised which the DoD then decided to address in a, in a
19 separate ruling issued in December of 2017. Now, this December
20 2017 ruling addressed the auto finance exception under
21 (f)(2)(iii).

22 And so I'm just going to quote the question, and this
23 is from the December 2017 ruling, and this goes to question 2
24 of the August 2016 ruling. So, "Does credit that a creditor
25 extends for the purpose of purchasing a motor vehicle or

1 personal property, which secures the credit, fall within the
2 exception to 'consumer credit' under 32 C.F.R. 232(f)(2)(ii) or
3 (iii) where the creditor simultaneously extends credit in an
4 amount greater than the purchase price of the motor vehicle or
5 personal property?"

6 So with this question, the DoD responded, well, it
7 depends, all right? And what the DoD explained was it
8 distinguished between credit that finances the purchase of the
9 vehicle itself and additional costs that are, quote, expressly
10 related to the, to the vehicle or object, such as leather
11 seats, versus financing the purchase of the vehicle and
12 credit-related products, such as GAP insurance.

13 All right. And so what the DoD said was, well, if
14 it's leather seats, then that's -- essentially the nexus to the
15 actual vehicle is so strong that it is still excluded from the
16 MLA because it falls within the auto finance exception.
17 However, if the financing offers a related product such as GAP
18 insurance, then it does not fall within the MLA's exception
19 because GAP insurance, what the DoD kind of explained was it's
20 just, the nexus isn't, isn't close enough to the vehicle
21 purchase.

22 Now, what happened as a result of that December 2017
23 ruling was that -- I think we kind of touched on this
24 earlier -- a number of organizations and institutions in the
25 auto finance industry went to the DoD and explained that this

1 is causing confusion, it will create compliance issues with the
2 auto finance companies, technical compliance issues, and also
3 it will prevent auto finance companies or dealerships from
4 offering GAP insurance to active military members, and that is
5 inconsistent with what the MLA is trying to do, which is
6 protect active military members.

7 And this was, this was a slew of organizations and
8 trade associations that, you know, as Ms. Varnell mentioned,
9 NADA, National Automobile Dealers Association; the ABA,
10 American Bankers Association; National Independent Automobile
11 Dealers Association; there are a number of others.

12 And ultimately, it was because of this concern that
13 was raised that in February of 2020, the DoD expressly withdrew
14 the December 2017 ruling, and in so doing, it reverted back to
15 the August 2016 interpretive rule, and what's really important
16 there is that again the August 2016 rule only applies to the
17 personal property exception, not the auto finance exception,
18 and so that kind of brings us full circle back to this case
19 because here plaintiff is claiming that his contract which is
20 for auto finance and included GAP insurance is not covered by
21 the auto finance exception, but that can't be the case because
22 the auto finance exception under (f)(2)(ii), it just -- again,
23 the plain language of the statute and (f)(2)(ii) under the
24 regulation both exclude auto finance transactions.

25 And so plaintiff's reliance on the August 2016 ruling

1 is just, it wouldn't make sense because if the August 2016
2 ruling was to apply here, then the DoD never would have come
3 out with the December 2017 ruling discussing specifically the
4 auto finance exception, and then in February of 2020, the DoD
5 would not have had to withdraw it because the August 2016
6 ruling would have expressly covered it, and for that reason, in
7 the February 2020 ruling, the DoD made it clear that auto
8 finance transactions like plaintiff's here aren't subject to
9 the MLA.

10 THE COURT: All right.

11 MR. KIM: And also, Your Honor, the MLA statutory
12 definition again, it's -- just the plain language shows that if
13 an auto finance transaction where the vehicle secures the loan
14 or the contract, it's just not included. That was never the
15 intention of the legislators and never the intention of the
16 DoD, I believe, when it passed these regulations.

17 And lastly, I would say that if the Court does
18 believe that the DoD's interpretation of this regulation covers
19 auto finance transactions, I would argue that the statutory
20 definition of "consumer credit," which expressly excludes auto
21 finance transaction, as a matter of law trumps the DoD
22 interpretation of the regulation because it's, because it's
23 just, it's legislation, and legislation here would trump the
24 DoD's interpretation of the regulation just based on the cases
25 that have been cited in my client's reply brief.

1 THE COURT: All right. Ms. Varnell, you mentioned
2 that credit unions use contracts for financing automobile sales
3 that do in your view comply with the MLA; is that correct?

4 MS. VARNELL: Yes, Your Honor.

5 THE COURT: Do those contracts include -- offer GAP
6 insurance?

7 MS. VARNELL: If they do offer GAP insurance, the
8 amount of that credit insurance would be included within the
9 APR and the finance charge, and the military consumer would be
10 given different disclosures than what were provided to the
11 consumer here. So --

12 THE COURT: Well, wait a minute, though. What kind
13 of disclosures are you -- because that's -- I don't believe
14 that that's in the complaint. What are the disclosure defects
15 that you think are at issue here?

16 MS. VARNELL: So the Military Lending Act is there,
17 there have been, like, literally they printed out examples
18 as -- the Department of Defense provided actual examples. You
19 say to the person, you know, this is a loan that is governed, a
20 transaction that is governed by the Military Lending Act. This
21 is your actual military lending annual percentage rate, the
22 MAPR. This is your actual finance charge. And it includes all
23 those additional costs that would pass onto the law.

24 And then it also provides frequently the -- if they
25 are not going to give them the actual fully written set of

1 disclosures like that, it provides a 1-800 number where the
2 consumer can call and get their rights under the Military
3 Lending Act disclosed to them.

4 So importantly, if this is governed by the Military
5 Lending Act, Congress said we are not -- you are, you are
6 protected from onerous provisions like disclosure of damages --
7 not disclosure, I'm sorry -- waiver of certain categories of
8 damages, arbitration, and other onerous provisions like that.
9 And so the consumer -- a military consumer is entitled to know
10 what their rights are under the Military Lending Act, and none
11 of that was given to the consumer in this case.

12 THE COURT: All right.

13 MS. VARNELL: That's why it brings us right back to
14 this critical distinction: Does -- are they entitled to the
15 exemption or not?

16 And I don't -- I could tell you're very informed on
17 this issue, and I'm delighted that you understand that it is
18 so -- it really is so dependent upon that threshold issue, and
19 so I would just alert the Court that the plaintiff's briefing
20 on pages 9 and 10 in particular respond directly to the
21 argument that Mr. Kim just advanced, and at the heart of our
22 response to all of this, the regulation did not change.

23 And nothing about what this complaint requests the
24 Court to do acts to contradict the plain language of the
25 statute because here's the thing: This was not a transaction

1 just to sell a used car. It was a used car along with a credit
2 insurance product, GAP. We can debate all day over the value
3 of GAP and whether you should buy it from your insurance
4 company or whether you should buy it at five times the price at
5 the car dealership, but that's not what is before the Court
6 today. It also finances other costs such as the processing
7 fee.

8 But nobody, what you did not hear Mr. Kim say to you
9 today is that anything about this transaction was -- involved
10 appropriate disclosures under the Military Lending Act because
11 the defendant does not believe that the MLA applies to the
12 loan.

13 THE COURT: Okay.

14 MS. VARNELL: And this Court will just have to decide
15 whether the plaintiff is correct or the defendant is correct in
16 that when you add in other products, whether or not that was
17 just another attempt to evade MLA, you know, to sneak in under
18 the cloak of a, a compliance transaction and -- or to cloak it
19 into a regular transaction that involves just the sale of a
20 car, or whether indeed it is exactly what the Department of
21 Defense was trying to fix in 2016.

22 If you go back and read the Code of Federal
23 Regulations, it's clear that in 2015, they said we have way too
24 many loopholes, and we've seen all of these unscrupulous
25 lenders trying to add on all of these extra charges and fees to

1 these transactions. We have to find a way to close the
2 loopholes because that's why there is no litigation under the
3 Military Lending Act.

4 So they attempted to do it by dramatically expanding
5 the definition of what, what it applies to, and they said that
6 consumer credit involved anytime that they're financing more
7 than four payments, any product essentially, anything that you
8 would -- that would fall under Reg Z, under the Truth in
9 Lending Act, and I submit to the Court that it is undeniable
10 that there is GAP sold within the financing product on this
11 transaction and that that product, GAP, fairly pulled this
12 transaction under the definition of consumer credit.

13 And the last thing I would say in closing, but it is
14 reiterated on pages 9 and 10, is that the Department of Defense
15 clearly said when it did withdraw the 2017 question-and-answer
16 guidance, it said in withdrawing this amended question and
17 answer, the Department is reverting back to the original
18 question and answer published in 2016, and it clarified it is
19 not changing any interpretation, and it sure as heck did not
20 change any regulation that was in existence, and the regulation
21 says that GAP was credit, it is a -- it is consumer credit, it
22 is financed, a product that was financed.

23 THE COURT: All right. Well, thank you, counsel.
24 It's been a very interesting argument. Obviously, since this
25 will be a case of first impression, I want to make sure we've

1 done the issues justice, so it will take a little time to get
2 an opinion out.

3 In the meantime, I can't recall whether -- has the
4 defendant filed an answer yet in this case? Probably not,
5 right, because you just filed the motion to dismiss?

6 MS. VARNELL: No, Your Honor.

7 MR. KIM: That's right, Your Honor.

8 THE COURT: All right. Obviously, any, any timing
9 for an answer is going to be delayed until you get a ruling on
10 this motion. I'm assuming we have not issued a scheduling
11 order. I don't think we have in this case. No. So there's
12 nothing else you-all need to do.

13 Obviously, if anything changes in terms of the, the
14 litigation world, if for some reason an opinion comes out of
15 the Florida court before we issue ours, that would obviously
16 potentially be relevant to this case, I would expect you-all to
17 advise us of any change in the law, but other than that, we
18 will try to get an opinion out as soon as possible.

19 But thank you, and you-all stay safe. Bye-bye.

20 MS. VARNELL: Thank you, Your Honor.

21 MR. KIM: Thank you, Your Honor.

22 (Which were all the proceedings
23 had at this time.)

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CERTIFICATE OF THE REPORTER

I certify that the foregoing is a correct transcript of
the record of proceedings in the above-entitled matter.

/s/

Anneliese J. Thomson